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No. 408

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, PETITIONER

v.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The supplemental judgment of the district court (App. B, *infra*) is unreported.

JURISDICTION

The original judgment of the court of appeals was entered on April 7, 1971 (App. A, *infra*). On June 23, 1971, the court granted the government's timely petition for rehearing, withdrew its original opinion and

entered a new opinion and judgment (App. C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Tax Lien Act of 1966 changed the federal law governing the priority of non-tax federal liens.

STATEMENT

This is an action by the Connecticut Mutual Life Insurance Company ("Connecticut Mutual") to foreclose a mortgage it held upon land owned by Mrs. Carter. The mortgage lien covered not only the debt but also a reasonable attorney's fee if the mortgage was foreclosed. The United States was made a defendant because the Farmers Home Administration held a second mortgage on the property. The district court ordered foreclosure of both mortgages, but the proceeds of the sale, although sufficient to satisfy the principal and interest secured by Connecticut Mutual's first mortgage lien, were inadequate to satisfy both the government's second mortgage lien and Connecticut Mutual's lien for attorney's fees. In a supplemental judgment, the district court held that Connecticut Mutual's lien for attorney's fees was superior to the government's lien. On the government's appeal, the court of appeals (Judge Rives dissenting) affirmed.

1. Connecticut Mutual loaned Mrs. Carter $375,000 in January 1962, secured by a mortgage on her citrus farm. A hard freeze occurred during the winter of 1962 which severely damaged citrus trees in the area,

including those of the mortgagor (App. A, p. 12). The area was designated a disaster area by the Secretary of Agriculture (27 F.R. 12986). Starting in 1963, the Farmers Home Administration, pursuant to an emergency loan program[1] authorized by 7 U.S.C. 1961 *et seq.*, made a series of loans to Mrs. Carter totalling $501,581.53, which were secured by second mortgages on her farm.

2. In April 1969, Connecticut Mutual, whose loan was then in default, sued for foreclosure in a Florida state court (App. A, p. 13). The United States removed the case to federal district court. The United States asserted its claim for $501,583.53 principal plus interest out of the proceeds of the sale. It did not contest the subordination of its claim to the principal and interest secured by the first mortgage but claimed priority over all attorney's fees arising out of the foreclosure proceeding.

The district court granted foreclosure and ordered the property sold. It directed that the $418,111.49 in principal and accrued interest due under Connecticut Mutual's mortgage lien be paid to Connecticut Mutual, and that any excess proceeds be paid into the registry of the court pending the court's determination of any lien priority issues that might remain. The court also

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[1] Under the program, a loan can be made where there exists "a general need for agricultural credit which cannot be met for temporary periods of time by private, cooperative, or other responsible sources * * * at reasonable rates and terms" and where "the need for such credit in such area [was] the result of a natural disaster." 7 U.S.C. 1961(a) (1) and (2).

determined that Connecticut Mutual had incurred a reasonable attorney's fee of $11,500.

Connecticut Mutual purchased the property for more than the amount of its first mortgage lien. The district court then ruled that Connecticut Mutual's lien for attorney's fees was superior to the government's lien for principal and interest on its second mortgages.

3. The court of appeals affirmed the holding of the district court that the government's lien was inferior to the lien for attorney's fees.[2] The court of appeals noted that the choate lien test of *United States* v. *New Britain*, 347 U.S. 81, and other decisions of this Court—which originated in tax litigation and under which state-created liens had priority over federal liens only if they were sufficiently perfected when the federal lien arose to be considered "choate"—has been extended to give federally-held mortgages priority over certain unrecorded liens which were admittedly superior under state law (App. A, p. 14). The court, however, did not consider itself bound by these cases and in the "absence of binding legal precedent" examined the Federal Tax Lien Act of 1966, 26 U.S.C. 6326, for guidance (App. A, p. 15). The court ruled

[2] The mortgagor also appealed, challenging the district court's confirmation of the foreclosure sale over her objections. The court of appeals affirmed the decision of the district court on this issue and denied *sub silentio* the mortgagor's petition for rehearing or, in the alternative, for certification of a state law question to the Florida Supreme Court. She filed a petition for a writ of certiorari challenging that ruling (No. 71-166, Oct. Term, 1971), and the government filed a memorandum in opposition thereto.

that the Tax Lien Act "substantially altered the priorities of federal tax liens so that a lien for attorney's fees if valid under local law is no longer subordinate to a subsequently-filed federal tax lien," and concluded that "[i]t would indeed be anomalous and contrary to our view of congressional intent to allow the FHA operating as a money-lending agency to prevail in a situation where the government as holder of a tax lien would have an inferior security interest."

Judge Rives dissented. He stated that the "FHA should not be cast in the role of a 'private lender'," and disagreed that the Federal Tax Lien Act "impliedly change[d] the rule in cases involving federal mortgage liens." He noted that the FHA, which began making loans to the mortgagor after her farm had been damaged by the freeze, did not act like a private lender but instead made its loans "for public rather than commercial purposes." (App. A, p. 22.) He added that "The revenues of the United States now rest upon a broad and certain tax base," and that "[i]t is not irrational for Congress to think that the Government can afford to relax in favor of private liens the protection heretofore afforded liens for taxes, but that the strict protection should remain in force as applied to the limited and specific appropriations made by Congress to federal lending agencies" (App. A, p. 24).

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of federal law that this Court should decide: whether the "choateness" test that has hitherto been applied in determining the priority of both federal tax liens and

federal non-tax liens should be abandoned for the latter because Congress changed it for the former in the Federal Tax Lien Act of 1966.

The federal government today is engaged in a wide variety of financial assistance programs, and holds a great number of mortgages upon property that frequently also is subject to other mortgages or against which other persons assert priority claims. The Small Business Administration, for example, has advised us that lien priority problems involving its mortgages arise daily and that at any time it has at least 100 active cases involving priority questions. The standard that governs the priority of this large group of federal non-tax liens—an issue which often is litigated in state courts, which must look to this Court for binding precedent on federal questions—is important not only to the United States but also to the many private lienors and others who have or assert liens against property on which the federal government also has a lien. As Judge Rives pointed out in his dissent, the choateness test "serves to limit the benefit that other lienors can receive from federal loans by providing that those liens," which have not become choate—

> must be subordinated to the federal claim in order that the financial aid which is the object of the federal loan will go either to the mortgagor or, if the loan fails, back to the Federal Government, and not to leave open the probability that a first mortgagee, which was not intended by Congress to be the beneficiary of federal financial assistance, should be the true

beneficiary through replenishment of its security. [App. A, *infra*, p. 23.]

2. The holding of the court of appeals that, because the Federal Tax Lien Act changed the choateness rule for tax liens, the rule also should be abandoned for non-tax liens, conflicts with the decision of the Court of Appeals for the Fourth Circuit in *H. B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank*, 388 F. 2d 156, certiorari denied, 390 U.S. 1005.[3] There the court in an *en banc* opinion by Judge Sobeloff, declined to extend the principle of the Tax Lien Act to a non-tax federal lien, and instead used the choateness test in subordinating a mechanic's lien (which it held not choate) to a lien of the Small Business Administration. Noting that both the language of the Tax Lien Act and its legislative history use the term "unrecorded *tax* liens" (emphasis in original) without ever "intimating a design to broaden the subordination to include other federal claims," the court concluded:

> We cannot say that it is illogical for Congress to deem it desirable to retain a priority for money it loans, while relinquishing the priority for its tax liens, which represents no financial outlay. Whatever may be the merits of symmetry in these two quite distinct, if cognate, areas, the argument seems more properly ad-

[3] The decision below accords with *Ault* v. *United States*, 317 F. Supp. 373 (D. Alaska), affirmed, 432 F. 2d 441 (C.A. 9), and *Standard Savings and Loan Association* v. *Evans*, 255 S.C. 207, 178 S.E. 2d 145.

> dressed to Congress than to this court. [388 F. 2d at 160.]

There is no reason to assume that Congress in passing the federal tax lien statute either addressed itself to issues other than tax liens or intended to make a change in the existing basis for resolving disputes concerning other federal liens (see Judge Haynsworth's concurring opinion in *Agsten,* 388 F. 2d at 161).

The fact that in *Agsten,* unlike in the present case, the government's claim to priority rested on the federal insolvency statute (31 U.S.C. 191) is immaterial. The critical fact is that the Fourth Circuit held that the Federal Tax Lien Act did not change the priority rule for federal non-tax liens, whereas the Fifth Circuit in the present case held exactly the opposite. In the light of its *Agsten* decision, there can be little doubt that if the present case had arisen in the Fourth Circuit, that court would have followed this Court's decisions in *United States* v. *Equitable Life Assurance Society,* 384 U.S. 323, and *United States* v. *Pioneer American Insurance Co.,* 374 U.S. 84, and would have given the government's second mortgage claim priority over Connecticut Mutual's claims for attorneys' fees.

3-4. Under the principles that this Court has developed for determining the priority of federal liens, under both the insolvency and the tax lien statutes, a federal lien is superior unless the state-created lien "attached to the property in question and became choate" before the federal lien arose. *United States* v. *New Britain,* 347 U.S. 81, 86. Other courts of appeals

have applied those decisions in holding that federal non-tax liens, whether or not the government asserted an insolvency priority, had priority over state-created liens that had not become choate when the federal lien arose.[4] The decision of the court of appeals in the present case is inconsistent with those decisions.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1971.

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[4] *E.g.*, *Director of Revenue, State of Colorado* v. *United States*, 392 F. 2d 307 (C.A. 10); *United States* v. *Oswald and Hess Co.*, 345 F. 2d 886 (C.A. 3); *United States* v. *County of Iowa*, 295 F. 2d 257 (C.A. 7); *Southwest Engine Co.* v. *United States*, 275 F. 2d 106 (C.A. 10); *United States* v. *Roessling*, 280 F. 2d 933 (C.A. 5); *United States* v. *Latrobe Construction Co.*, 246 F. 2d 357 (C.A. 8), certiorari denied, 355 U.S. 890.

[5] The court of appeals' stated bases for distinguishing these precedents—that the prior cases in the courts of appeals involved "unrecorded liens" rather than a lien for attorney's fees set forth in a recorded mortgage agreement—ignores the fact that two of the decisions of this Court, *Equitable Life* and *Pioneer America*, *supra*, involved precisely the same type of competing recorded lien—a lien for the first mortgagee's attorney's fees—which is asserted here.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 29435

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF-APPELLEE,

v.

LURA VIRGINIA BICKEL LEE CARTER, ET AL.,
DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNTED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

(June 23, 1971)

ON PETITION FOR REHEARING

Before RIVES, AINSWORTH and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: We originally decided this appeal on April 7, 1971, Slip Opinion No. 29,435. However, upon further consideration, we have decided to grant the government's petition for rehearing and withdraw our initial decision. The following opinion is substituted in lieu thereof:

In this three-party contest, the mortgagor seeks to

set aside the entire foreclosure sale while the United States, the second mortgagee, argues that its lien should come before the claim for attorneys' fees provided for in the first mortgage held by Connecticut Mutual Life Insurance Company. The district court held the second mortgage lien inferior to Connecticut Mutual's lien for attorneys' fees and confirmed the foreclosure sale despite the mortgagor's objections.

In January of 1962 Lura Virginia Bickel Lee Carter (mortgagor) mortgaged her Florida citrus farm property to Connecticut Mutual Life Insurance Company pursuant to an agreement which contained the standard provision for payment of attorneys' fees [1] by the mortgagor in the event of default on the underlying promissory note. A hard freeze occurred during the winter of 1962 severely damaging the mortgagor's citrus trees. Consequently, in July of 1963 the Farmers Home Administration (FHA), a branch of the federal government that extends agricultural credit when the need for such arises from a natural disaster, began lending the mortgagor sums of money secured by a second mortgage which also contained a provision for payment of attorneys' fees, and specifically stated that

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[1] The mortgage stated the following in regard to attorney's fees:

"To pay to (Connecticut Mutual) promptly upon demand all costs, expenses and attorney's fees, including the cost of any title examination, supplemental abstract of title or title insurance, that may be incurred by (Connecticut Mutual) in any proceedings, legal or otherwise, affecting the mortgaged property, or any part thereof, or the title thereto, or the validity or priority of this mortgage or that may be incurred by (Connecticut Mutual) by reason of the failure of the Mortgagor to keep and perform any of the covenants or agreements contained here or

the second lien was subject to the mortgage held by Connecticut Mutual.[2]

When the mortgagor failed to meet the payments on the first mortgage, Connecticut Mutual initiated a foreclosure suit in the Florida state court in April, 1969. The action was removed to federal district court [3] where the trial judge granted foreclosure, and held that the mortgagor owed Connecticut Mutual $418,111-.49 in principal and accrued interest and $11,500 as reasonable attorneys' fees. After the ensuing sale, at which the sole bidder, Connecticut Mutual, purchased the property for the approximate amount of the total indebtedness due it, the court held that, contrary to the contentions advanced by the government, the first mortgage lien for attorneys' fees was superior to the FHA second mortgage lien.

The court overruled without an adversary hearing the mortgagor's objections to the fairness of the sale.

The single disputed issue between the FHA and Connecticut Mutual involves the priority of the lien

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in said promissory note. All such costs, expenses and attorneys' fees by (Connecticut Mutual) shall bear interest from the date of payment at the rate of 8% per annum until repaid by Mortgagor and shall with such interest, be a part of the debt secured by this mortgage.

"This mortgage is intended by the parties to secure, and does and shall secure the payment, fully and completely, of any and all sums of money herein described. . . ."

[2] FHA's mortgage expressly stated on its face that the second lien was "Subject to (sic) mortgage held by the Connecticut Mutual Life Insurance Company. . . ."

[3] The case was removed to federal court because the United States was joined as a defendant by virtue of its status as second mortgagee. See 28 U.S.C. §§ 1444 and 2410.

for attorneys' fees contained in the first mortgage. FHA contends its second mortgage is superior to Connecticut Mutual's lien for attorneys' fees because the amount of attorneys' fees was not choate (specific and certain) when the FHA mortgage attached in July of 1963. For authority, FHA relies principally upon three Supreme Court cases—*United States* v. *Equitable Life Assurance Society of the United States,* 1966, 384 U.S. 323; *United States* v. *Pioneer American Insurance Co.,* 1963, 374 U.S. 84; *United States* v. *New Britain, Connecticut,* 1953, 347 U.S. 81—which hold that under the well-known rule of "first in time, first in right" a federal tax lien is superior to all other liens not choate at the time the federal tax lien is filed.

FHA quite correctly points out that the choate lien test, although originating in the tax lien field, has been extended to give federally-held mortgages priority over certain unrecorded liens which were admittedly superior under state law. *United States* v. *Roessling,* 5 Cir., 1960, 280 F. 2d 933; *United States* v. *Oswald and Hess,* 3 Cir., 1965, 345 F. 2d 886; *United States* v. *County of Iowa,* 7 Cir., 1961, 295 F. 2d 257. However, our research reveals no decision which would elevate a government mortgage to a position of superiority under the facts of the present case where the FHA, operating as a private lender, voluntarily took a second mortgage fully aware (see footnote 2, supra) of the then existent attorneys' fees clause in the first mortgage. Thus, finding an absence of binding legal precedent, we proceed to a consideration of whether congressional intent commands priority of the govern-

ment's security interest in the instant set of circumstances.

As previously noted, the choate lien test, contended for by the government, emanated from three Supreme Court cases, supra, all of which were decided before the passage of the Federal Tax Lien Act of 1966 (P.L. 89–719), amending 26 U.S.C. § 6323. The amendment substantially altered the priorities of federal tax liens so that a lien for attorneys' fees if valid under local law is no longer subordinate to a subsequently-filed federal tax lien.[4] Although the 1966 amendment does not of itself affect the priority of the claims here involved,[5] the statute diminishes the validity of the choate lien test in the important field of taxation where the doctrine originated. It would indeed be anomalous and contrary to our view of congressional intent to allow the FHA operating as a money-lending agency to prevail in a situation where the government as holder of a tax lien would have an inferior security interest. *Ault* v. *United States,* D. Alaska, 1968, 317 F. Supp. 373 (aff'd. and opinion adopted) 9 Cir., 1970, 432 F. 2d 441; *Standard Savings and Loan Association* v. *Evans* (S. Carolina Spr. Ct., 1970, No. 19,135),

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[4] In pertinent part, 26 U.S.C. § 6323 provides as follows:

"(b) Even though notice of a lien imposed by section 6323 (federal tax lien) has been filed, such lien shall not be valid—

"(8) Attorneys' liens.—With respect to judgment. . . . as against an attorney who under local law holds a lien . . . ."

[5] See, for example, *H. B. Agsten & Sons, Inc. v. Huntington Trust and Savings Bank*, 4 Cir., 1967, 388 F. 2d 156, cert. den. 390 U.S. 1025, where the court held that the Federal Tax Lien Act of 1966 did not by implication overrule the Federal Insolvency Statute, 31 U.S.C. 191.

[illegible] suit is [illegible] bill at the [illegible] ten days to [illegible] be considered by [illegible]. After Mrs. Carter [illegible] this period, the district [illegible] consented the motion and [illegible] and then entered an order [illegible] the suit. Mrs. Carter now asserts that [illegible], supra, the court should have gone [illegible] and conducted a hearing to determine the [illegible] of the objections. We cannot agree.

In the first instance, Mrs. Carter at no time re-

quested the district court to hold a hearing. Secondly, the statute requires only that the court "consider" the objections and we find an absence of any indication from the Florida courts that the term "consider" must be defined to require the convening of a hearing. Finally, an examination of the specific objections raised by the mortgagor reveals that they were not of such a nature as would necessitate the taking of testimonial testimony or the hearing of evidence.

The mortgagor first alleged in her objections that the land should have been sold in parcels rather than en masse. Although this was perhaps the strongest of the objections, a review of the record discloses the mortgagor received a full-blown hearing on the parcel-en masse issue prior to the sale.

The mortgagor's second objection was that Connecticut Mutual promised to seek a 90-day postponement of the sale if the mortgagor would pay $25,000 before the sale, and that when the mortgagor offered the $25,000, Connecticut Mutual declined to accept payment. The offer by Connecticut Mutual was obviously unsupported by consideration, and the question of promissory estoppel did not arise since the mortgagor did not allege that she relied upon the promise to her detriment. Proving the factual validity of the mortgagor's allegations at an evidentiary hearing would have been pointless since the objection, even if true, would not have been a ground for setting aside the sale.

Thirdly, the mortgagor objected that the sale price was inadequate. Under Florida law, mere inadequacy of purchase price, without more being alleged, is not

a ground for setting aside a foreclosure sale, *Maule Industries* v. *Seminole Rock and Sand Company*, 1957, Fla., 91 So. 2d 307; *Dresser and Garfield, Inc.* v. *Teachers Insurance and Annuity Association of America*, 1967, Fla. App., 201 So. 2d 497, and this rule seems particularly applicable in the case at hand where the sum offered by any prospective bidder would inevitably be affected and reduced by the government's right to redeem the property within one year of the sale under 28 U.S.C. 2410(c).[6] The court was aware of the price bid at the sale, $434,000; of the maximum value alleged by the mortgagor, $1,000,000; and of the government's statutory right of redemption. Having these facts before it, the court was well equipped to "consider" the objection of inadequate purchase price without holding a hearing. The mortgagor simply failed to make allegations which, taken to be true, would justify voiding the sale under Florida law.

Lastly, the mortgagor challenged the advertising of the property as inadequate. A hearing was not necessary here because the district court could easily determine that the advertising complied with the statutory requirements. See Florida Statutes, § 702.02(2).

Subsequent to oral argument, we were informed by counsel for the government that the United States, as junior lienor, exercised its statutory right of redemption under 28 U.S.C. § 2410(c) by paying Connecticut

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[6] ". . . Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. . . ." 28 U.S.C. § 2410(c).

Mutual $475,452.66, the full amount of the first mortgage together with attorneys' fees, court costs, and accrued interest. Having done so, the government presently has title to the realty, *Quinn Plumbing Co.* v. *New Miami Shores Corporation,* 1930, Fla., 129 So. 690, but, as conceded in the government's brief, Mrs. Carter's account must be credited with a sum equal to that which would have been credited her if the United States had bid at the foreclosure sale the amount that the Farmers Home Administration's regulations [7 C.F.R. 1872.17(b) (3) (vi)] required it to bid. We therefore remand the case to the district court with directions that the United States credit Mrs. Carter's account with an amount consistent with whatever sum the court determines the government would have bid at the foreclosure sale.[7] In this manner, the parties will be restored to the position they would have occupied had the government initially purchased the property from the foreclosure sale.

Affirmed in part and remanded with directions.

RIVES, *Circuit Judge.* dissenting:

When we originally decided this appeal, all three judges had thought that the exercise of the Government's statutory right of redemption rendered moot the issue of priority of liens. I now agree with my

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[7] Although the government stated in its brief that it would have bid $900,000 at the foreclosure sale, it also stated that the maximum bid under the regulations, 7 C.F.R. 1872.17(b)(3)(vi), is the lesser of gross investment or estimated resale value. Assuming, as the government contends, that the amount bid would have been estimated resale value, such a determination may require the hearing of evidence by the district court.

brothers that that issue had not become moot, but, with all deference, I cannot agree with their present decision granting priority to Connecticut Mutual's inchoate lien for attorneys' fees over the lien of FHA's second mortgage. On the second issue as to the necessity for an evidentiary hearing on the mortgagor's objections to the confirmation of the foreclosure sale, I had thought that the Government's credit of the mortgagor's account with the amount which FHA should have bid at the foreclosure sale would probably be enough to satisfy the mortgagor and had, therefore, concurred in the result of the majority's decision. The mortgagor proved to be anything but satisfied. On the merits of that issue also, with all deference, I disagree with the majority's disposition.

In my opinion, (1) the lien of FHA under its second mortgage is superior to Connecticut Mutual's lien for attorney's fees; and (2) the district court erred by failing to grant the mortgagor an evidentiary hearing on her objections to the confirmation of the foreclosure sale.

1. *Priority of Liens*

It seems to me settled law that prior to the Federal Tax Lien Act of 1966,[1] both federal tax liens [2] and federal mortgage liens [3] took priority over all competing

[1] Pub. L. No. 89–719, 80 Stat. 1125, amending 26 U.S.C. 6323.

[2] United States v. New Britain, 1954, 347 U.S. 81; United States v. Pioneer American Ins. Co., 1963, 374 U.S. 84; and United States v. Equitable Life Assur. Soc., 1966, 384 U.S. 323.

[3] United States v. Roessling, 5 Cir. 1960, 280 F2d 933, 935–936; Southwest Engine Co. v. United States, 10 Cir. 1960, 275

liens except those which became "choate" [4] before the federal lien attached. The Federal Tax Lien Act of 1966 by its terms applies only to *tax* debts, and I submit that it does not impliedly change the rule in cases involving federal mortgage liens. Indeed the majority opinion concedes, as it must, that the statute "does not of itself affect the priority of the claims here involved." Instead, it casts FHA in the role of "a private lender" which "voluntarily took a second mortgage" with notice of the attorney's fee clause in the first mortgage and says that, "It would indeed be anomalous and contrary to our view of congressional intent to allow the FHA operating as a money-lending agency to prevail in a situation where the government as holder of a tax lien would have an inferior security interest."

I submit that FHA should not be cast in the role of a "private lender." A private lender is properly actuated by motives of profit, and is free to refuse to lend money on a second mortgage. By contrast, FHA

F.2d 106; United States v. County of Iowa, 7 Cir. 1961, 295 F.2d 257; W. T. Jones & Co. v. Foodco Realty, Inc., 4 Cir. 1963, 318 F.2d 881, 889, n. 19; United States v. Oswald and Hess Co., 3 Cir. 1965, 345 F.2d 886. The Supreme Court also in the *New Britain* case, *supra*, equated mortgage liens with statutory liens, 347 U.S. at 84.

[4] That is certain as to lienor, liened property, and amount. United States v. New Britain, *supra*, 347 U.S. at 84; United States v. Pioneer American Ins. Co., *supra*, 374 U.S. at 89; United States v. Equitable Life Assur. Soc., *supra*, 384 U.S. at 327, 238. The last two of those decisions held specifically that an attorney's fee for foreclosing a first mortgage does not give rise to a "choate" lien until the amount of the fee has become certain.

lends money pursuant to a public policy mandated by Congress, for example, where (as in this case) a natural disaster has created a need for agricultural credit which cannot be met from other sources (7 U.S.C. § 1961). In other instances, FHA makes loans to aid in the purchase and operation of family farms (7 U.S.C. §§ 1922–1923, 1941–1942); to help farmers in land and water development, use and conservation (7 U.S.C. § 1924); and for other such purposes (see 7 U.S.C. §§ 1921–1991). The Congress provided that if credit is reasonably available from private sources FHA cannot make a loan (7 U.S.C. §§ 1922(4), 1941(4), 1961(a)(1), 1983(a), (c)).

This case furnishes a good illustration of the difference between FHA and a private lender. Connecticut Mutual lent the mortgagor $375,000 in January 1962. In the winter of 1962–63, the mortgaged citrus farm was damaged by a freeze. In 1963, FHA began to make emergency loans to the mortgagor even though her operation had been so damaged by the freeze that she was unable to meet the principal payment due to Connecticut Mutual at the beginning of 1964. She never made another principal payment (with the exception of $5,000 paid in 1969). When the first FHA loan was made the damage to the farm had occurred, but Connecticut Mutual's mortgage loan was not in default.[5] FHA continued making advances after there was a default.

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[5] Under the standard laid down in *Equitable Life*, *supra*, 384 U.S. at 328, 329, "No liability [for attorneys' fees] having been incurred there could of course be no lien in existence at the time the federal lien matured."

It is because FHA and other government loans are made for public rather than commercial purposes that a special rule of priority applies to govern federal loans. The lien choateness test serves to limit the benefit that other lienors can receive from federal loans by providing that those liens which have not become certain as to identity of lienor, liened property, and amount of claim by the time the federal lien attaches must be subordinated to the federal claim in order that the financial aid which is the object of the federal loan will go either to the mortgagor or, if the loan fails, back to the Federal Government, and not to leave open the probability that a first mortgagee, which was not intended by Congress to be the beneficiary of federal financial assistance, should be the true beneficiary through replenishment of its security.

With deference, I submit that my brothers tread upon the powers of Congress when they find that, "The collection of taxes is certainly more vital to the government's existence than the making of farm loans and if Congress determines (as it has) that a federal tax lien, involuntarily imposed upon the government, is not unduly threatened by an inchoate lien for attorneys' fees, then we see no reason to exempt a federal mortgage lien, which the government sought to obtain, from the operation of a provision for attorneys' fees in a first mortgage." (Majority opinion, p. 5.) That seems contrary to the reasoning of Judge Sobeloff in holding the 1966 Tax Lien Act inapplicable to the Federal Insolvency Statute, 31 U.S.C. § 191:

> "The language and legislative history of the statute [1966 Tax Lien Act], however, convince

> us that Congress did not purpose to elevate inchoate mechanics' liens over federal contractual claims. The terms of the statute and the detailed Committee reports of both houses of Congress[4] speak repeatedly of subordinating federal unrecorded *tax* liens to mechanics' liens, never intimating a design to broaden the subordination to include other federal claims.
>
> * * * * *
>
> "We cannot say that it is illogical for Congress to deem it desirable to retain a priority for money it loans, while relinquishing the priority for its tax liens, which represent no financial outlay. Whatever may be the merits of symmetry in these two quite distinct, if cognate, areas the argument seems more properly addressed to Congress than to this court.

H. B. Agsten & Sons, Inc. v. *Huntington Trust & Savings Bank,* 4 Cir. 1967, 388 F.2d 156, 160.

The revenues of the United States now rest upon a broad and certain tax base. Government taxes are so certain that the President is recommending to the Congress that the Government share its revenues with the States and municipalities. It is not irrational for Congress to think that the Government can afford to relax in favor of private liens the protection heretofore afforded liens for taxes, but that the strict protection should remain in force as applied to the limited and specific appropriations made by Congress to federal lending agencies. Such strict protection is all the more needed as against liens for attorneys' fees for foreclos-

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[4] S. Rep. No. 1708, 89th Cong. 2d Sess. (1966); H. Rep. No. 1884, 89th Cong. 2d Sess. (1966), U.S. Code Cong. & Admin. News 1966, p. 3722."

ing mortgages, for at least two reasons, (1) that the amounts of such fees are extremely elastic and (2) that such fees allowed in states where foreclosure is customarily effected by suit in court are much larger than the fees charged in states where the simpler method of foreclosure under power of sale is customary. In any event, Judge Sobeloff was correct in holding that such an argument is more properly addressed to Congress than to the courts. I decline to join in extending the Federal Tax Lien Act of 1966 to include FHA or other federal mortgage liens.

2. *Failure to Grant Hearing on Objections to Foreclosure Sale.*

It seems to me that the mortgagor did not have to expressly request a hearing on her objections to the confirmation of the foreclosure sale any more so than a party plaintiff or defendant has to expressly ask the court for a hearing before ruling on the merits of a law suit. The kind of hearing necessary depends upon the circumstances of the particular case. I quote three grounds of Mrs. Carter's timely filed objection:

> "1) The only bid received in the aforesaid sale was that of The Connecticut Mutual Life Insurance Company, holder of the first mortgage, which bid the property in for approximately $434,000.00. This bid price is grossly inadequate in proportion to the value of the property. Defendant is informed and believes that the Farmers Home Administration, the holder of the second mortgage for approximately $500,000.00 on said lands, had

previously appraised the property at a value in excess of $1,000,000.00.

* * * * *

"4) As a result of the inadequacy of the advertising, sale of the property en masse, and the sale in one county of property situated in two different counties, with the resulting gross inadequacy of price bid, the Defendant Lura Virginia Bickel Lee Carter stands to suffer serious economic harm and is in jeopardy of having default judgment rendered against her in favor of the Farmers Home Administration, which holds a second mortgage on said lands, in the amount of $500,000.00, said second mortgagee having made no bid at the aforesaid sale.

"5) Defendant Lura Virginia Bickel Lee Carter was informed by the Plaintiff that if she would pay $25,000.00 before the sale on December 18, 1969, the Plaintiff would seek a postponement of the sale and permit the said Defendant to have 90 additional days to pay up any arrearage with respect to Plaintiff's mortgage on said lands. In reliance on said promise, said Defendant offered to the Special Master and to the attorney for the Plaintiff to pay the sum of $25,000.00 prior to the actual sale, which offer of payment was declined and the sale was effected, beginning at 11:00 A.M., December 18, 1969." (App. 14, 15, 16.)

I submit that the mortgagor's objections raised genuine issues as to material facts upon which she was entitled to an evidentiary hearing prior to the sale.

The record discloses that the district judge acted without knowing* that the two parcels of land, one situated in Pasco County and the other in Hernando County were at least eight miles apart.

My brothers say that, "Under Florida law, mere inadequacy of purchase price, without more being alleged, is not a ground for setting aside a foreclosure sale." (Majority opinion, p. 7.) That may be true, but I submit that the Florida law is in line with that generally prevailing, that a judicial foreclosure sale will be set aside for such gross inadequacy of price as impeaches the fairness of the sale. In *Marsh* v. *Marsh*, Fla. 1916, 72 So. 638, 639, it was said:

> "In Macfarlane v. Macfarlane, *supra* [39 So. 995], following the prior holding in Lawyers' Co-operative Publishing Co. v. Bennett, *supra* [16 So. 185], and in line with the general rule established by the courts, we stated that, while mere inadequacy of price would not be sufficient to warrant the setting aside of a judicial sale—
>
> > "'when such inadequacy is connected with or shown to result from any mistake, accident, surprise, misconduct, fraud, or irregularity, the sale will generally be set aside.'
>
> "We also referred with approval to the holding in Schroeder v. Young, 161 U.S. 334, 16 Sup. Ct. 512, 50 L.Ed. 721:
>
> > "'While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the

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* "THE COURT: * * * And I think if it is contiguous or closely contiguous, why it ought to be sold at one time.

"Mr. MCCLAIN [Mortgagor's Counsel]: Well, I was told differently." [App. p. 67.]

> transactions, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience.'"

It now appears from the Government's exercise of its statutory right to redemption that Connecticut Mutual's successful bid of $434,000.00 was less than half of the value of the mortgaged property.

My brothers say that "the sum offered by any prospective bidder would inevitably be affected and reduced by the government's right to redeem the property within one year of the sale under 28 U.S.C. 2410 (c)." (Majority opinion, p. 7.) My brothers fail to note that the same statute also provides that in exercising its right of redemption the Government must pay interest "at 6 percent per annum from the date of such sale, and (3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used, by the purchaser) a reasonable rental value of such property." 28 U.S.C. § 2410(d) (2) & (3). Those provisions might effectively prevent the Government's statutory right of redemption from chilling bids as apprehended by the majority.

My brothers say: "Lastly, the mortgagor challenged the advertising of the property as inadequate. A hearing was not necessary here because the district court could easily determine that the advertising complied with the statutory requirements. See Florida Statutes, § 702.02(2)." (Majority opinion, p. 8.)

The mortgagor's objection did not go to any failure to give legal notice of the sale but to the need of addi-

tional advertising. [See ground 2 of the mortgagor's objection, App. p. 14.] In urging such a need prior to the sale, mortgagor's attorney had made that plain:

> "Mr. McCLAIN [Mortgagor's attorney]: With any legal notice it is always this way. I mean if you just get a very cold notice that something is going to be sold, it just does not normally, Your Honor, attract anybody to bid. And this is important property. It is strategically located. I don't think it takes any realtor to know this." (App. p. 60.)

My brothers say "the statute [Florida Statutes § 702.02(5)] requires only that the court 'consider' the objections and we find an absence of any indication from the Florida courts that the term 'consider' must be defined to require the convening of a hearing." (Majority opinion, p. 6.) So far as I have found, the Florida courts have not had occasion to define "consider" as used in that statute either way, that is, to require or not to require an evidentiary hearing. I would think that the necessity of a hearing would depend upon the nature of the objections. In this case, I submit that to meaningfully "consider" the objections requires that the mortgagor be given an opportunity to prove the facts which she averred.

The only court which can finally and authoritatively construe the Florida Statute is the Supreme Court of Florida. It seems to me that the ends of justice require us to grant the mortgagor's request that, pursuant to Rule 4.61, Florida Appellate Rules, and Section 25.031, Florida Statutes, we certify an appropriate question

to the Supreme Court of Florida for its decision. My brothers decline so to do.

For the reasons stated. I respectfully dissent as to both issues decided.

APPENDIX B

In the United States District Court for the Middle District of Florida—Tampa Division

(No. 69-219 Civ. T.)

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, A CONNECTICUT CORPORATION, PLAINTIFF,

v.

LURA VIRGINIA BICKEL LEE, ETC., ET AL., DEFENDANTS

SUPPLEMENTAL JUDGMENT

THIS CAUSE came on for consideration upon the submission of briefs by plaintiff and defendant United States of America. The Court granted plaintiff's motion for summary judgment on November 12, 1969. In the order of that date the Court set the reasonable attorney's fee due plaintiff at $11,500. Previously, at the hearing on November 6, 1969, the Court requested legal briefs on the following issue:

> Does plaintiff's first mortgage lien for attorney's fee owed it by defendant Lura Virginia Bickel Lee have priority over defendant United States of America's second mortgage lien?

No cases on point have been found by either party or by the Court. A basic legal principle is applicable in initially considering the question. That principle is "that federal law is determinative where the question involved is the priority to be accorded to a lien of the

federal government whatever its source." *United States* v. *Oswald & Hess Co.*, 345 F. 2d 886, 887 (3 Cir. 1965); *accord, United* v. *Security Trust & Savings Bank*, 340 U.S. 47, 49 (1950).

The determinative federal law was long ago stated by Chief Justice Marshall in *Rankin* v. *Scott*, 12 Wheat. 177 (1827); it is that first in time is first in right. In other words, absent remedial legislation, an earlier choate lien prevails over a later choate lien. *United States* v. *New Britain*, 347 U.S. 81 (1953). The law as to federal tax liens has been cited to the Court as apposite. See 26 U.S.C. §§ 6321-6323; 31 U.S.C. § 191. In cases involving federal tax liens and questions of priority of liens, the courts have consistently kept in mind the fact that "the purpose of the federal tax lien statute is to insure prompt and certain collection of taxes due the United States." *United States* v. *Bond*, 279 F. 2d 837, 847 (4 Cir. 1960). And in cases involving the first in time, first in right principle, it has been held that a lien is choate—that is, perfected—"when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States* v. *New Britain*, supra at 84. Only when a lien has thus ripened will it precede a federal tax lien.

Two recent Supreme Court cases have dealt with the relationship of federal tax liens and liens for attorneys' fees. In *United States* v. *Pioneer Ins. Co.*, 374 U.S. 84 (1963), the Court had before it a mortgage obligating the mortgagor to pay attorney's fee in the event of default. The Court held that a federal tax lien filed after commencement of the foreclosure

suit but before the final decree had precedence over a lien for attorney's fee. Although the identity of the lien holder and the property subject to the lien were definite, the Court reasoned that the lien for attorney's fee did not become choate until the time of the decree of final foreclosure, for only then was the amount of the lien determined.

In *United States* v. *Equitable Life Assurance Society,* 384 U.S. 323 (1966) the Court dealt with "whether a federal tax lien is entitled to priority over the mortgagee's claim for such an attorney's fee where notice of the tax lien is recorded prior to default by the mortgagor." Id at 324. The Court held that the attorney's fee lien here was even more inchoate than in the *Pioneer American* case. Here the tax lien was recorded prior to default by the mortgagee; the lien for attorney's fee could not possibly be choate at that time, for it would not be perfected until the amount of the fees had been determined, which certainly could not occur prior to the default.

On the strength of these cases and other case law, the government argues that its lien in the form of a second mortgage precedes the plaintiff's lien for attorney's fee under the first mortgage. The government's reasoning runs as follows: The federal principle of first in time, first in right prevails. A lien must be choate to prevail over a prior lien. A lien for attorney's fee arising out of a mortgage foreclosure does not become choate until the amount of the attorney's fee has actually been set by the Court, as seen in the *Pioneer American* and *Equitable* cases. Here the government took a lien in the form of a second mortgage

prior to the setting of the amount of plaintiff's attorney's fee. Therefore the government's second mortgage lien precedes the plaintiff's lien for attorney's fee because the former was not choate prior to the second mortgage become choate. The Court holds that the plaintiff's lien for attorney's fee has priority over the government's second mortgage.

The reasons are these:

First: The case does not involve a federal tax lien. The factors which spur courts to protect the federal revenue and insure prompt payment of taxes are lacking. Therefore, "the rigorous federal lien choateness test"—ubiquitous in federal tax lien cases—is "not necessarily applicable." *United States v. Pioneer American Ins. Co.,* supra at 90. And therefore, assuming the case involved a question of choateness of liens, the stringent test of choateness found in cases involving federal tax liens would not be appropriate.

Second: There are no statutory provisions in favor of the government relevant to the case. The government, acting as any private person, voluntarily and with its eyes open took a second mortgage, knowing that the first mortgage, as is customary, provided attorney's fees to the mortgagee should the mortgagor default. Such a provision normally binds holders of second mortgages, who take only after the initial mortgage has been satisfied, together with attorney's fees, and there is no reason why the same should not be true as to the government. No special policy or interest requires that the government be treated differently from any ordinary second mortgagee.

Third: The Court has already noted that if this case

were a matter of choateness the restrictive test of choateness found only in federal tax lien cases would probably not be applicable, since government revenue is not involved. However, this case does not deal with choateness. Rather, a common situation is involved—a first mortgage has been foreclosed and the mortgagee is entitled to the proceeds of the foreclosure, as well as an attorney's fee. The second mortgagee, usually a private party, but here the government, takes only after the first mortgage, other costs and attorneys' fees have been satisfied. Since the government voluntarily took a second mortgage, there are no reasons for it to be treated except as a normal second mortgagee. It is, therefore,

Ordered, Adjudged and Decreed:

1. That Plaintiff's lien herein securing the indebtedness owed it by Defendant Lura Virginia Bickel Lee, etc., including that portion of the said lien and indebtedness in the amount of $11,500.00 attributable to attorneys' fees incurred by Plaintiff in bringing this action in foreclosure of its mortgage is prior and superior in all respects to any lien of Defendant United States of America on property subject to said lien of Plaintiff, which property is described in Appendix "A" hereto and incorporated as a part hereof, and said lien of Plaintiff is specifically prior and superior to any lien, if valid, of defendant United States of America arising out of those certain mortgages of defendant United States of America in Paragraphs 15, 16 and 17 of plaintiff's Complaint filed in this action.

2. That there is now due and owing by defendant Lura Virginia Bickel Lee, etc., to plaintiff the sum of $429,611.49, plus and in addition, all further costs, expenses, court costs, and other amounts paid or incurred by plaintiff in connection with this action, plus interest at six percent (6%) per annum on the total of all such amounts from and including November 6, 1969 until paid.

3. That the Special Master appointed in the Summary Judgment entered on November 12, 1969, shall sell the property described on Appendix "A" under the terms and condition of said Summary Judgment, and after confirmation of said sale said Special Master shall disburse the proceeds of the sale as follows:

(a) All costs and expenses of these proceedings including costs of sale shall be paid.

(b) The sum of $429,611.49, plus all costs, expenses, court costs and other amounts paid or incurrred by plaintiff in connection with this action, plus interest at six percent (6%) per annum on the total of all such amounts from and including November 6, 1969 until paid, shall be paid by said Special Master to plaintiff.

(c) In the event any surplus remains after payment of the amounts set forth in subparagraphs (a) and (b) above, both inclusive, the Special Master shall deposit said surplus in the registry of this Court, subject to further order of this Court, and in that event, the Clerk is directed to give notice to the defendants herein, in order that said defendants might by appropri te pleadings make claim to said surplus.

4. The Summary Judgment entered in this action on November 12, 1969, together with this Supplemental Judgment, shall constitute the Final Judgment in this action, and the Special Master shall forward, in addition to the documents described in Paragraph 10 of said Summary Judgment, a certified copy of this Supplement Judgment to the Clerk of the Circuit Court of Hernando County, Florida, and to the Clerk of the Circuit Court of Pasco County, Florida to be recorded in the appropriate public records of each such county.

DONE and ORDERED at Tampa, Florida, this 15th day of December, 1969.

BEN KRENTZMAN,
United States District Judge.

[Appendix "A" to the above, the land description, is omitted]

APPENDIX C

United States Court of Appeals
for the Fifth Circuit

No. 29435

D. C. Docket No. Civ. 69–219–T

October Term, 1970

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF-APPELLEE

v.

LURA VIRGINIA BICKEL LEE CARTER, ET AL.,
DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

Before RIVES, AINSWORTH and MORGAN, Circuit Judges.

JUDGMENT ON PETITION FOR REHEARING

This cause came on to be heard on plaintiff-appellee's petition for rehearing.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion and judgment originally entered by this Court on April 7, 1971 is withdrawn, and the judgment appealed from be, and the same is hereby affirmed in part; and that

this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court.

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

JUNE 23, 1971.

RIVES, *Circuit Judge,* dissenting:

Issued As Mandate:

U.S. GOVERNMENT PRINTING OFFICE: 1971